BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONITA K. ZAMARRIPA	)	
Claimant	)	
V.	)	
	)	
COMFORT INN	)	Docket No. 1,054,536
Respondent	)	
AND	)	
	)	
ZURICH NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent requested review of Special Administrative Law Judge (SALJ) C. Stanley Nelson's December 10, 2012 Award. The Board heard oral argument on April 19, 2013. Matthew L. Bretz, of Hutchinson, Kansas, appeared for claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

SALJ Nelson adopted Dr. Do's opinion that claimant had a 10% whole body functional impairment. SALJ Nelson adopted the task loss opinion of Dr. Do of 45.8%. Averaging the 45.8% task loss and 100% wage loss, SALJ Nelson awarded claimant permanent partial disability benefits based on a 72.9% work disability. SALJ Nelson found that claimant's compensation rate was $233.52.

The Board has considered the record and adopted the stipulations listed in the Award. The Board has not considered Stein Exhibit 3, which was not admitted as part of the evidentiary record.

ISSUES

Respondent argues claimant failed to prove she sustained a work-related injury on October 18, 2010, and requests the Board reverse SALJ Nelson's Award. If the case is compensable, respondent asserts claimant failed to provide a credible task loss opinion and should only be entitled to a 50% work disability at most.

Claimant argues the temporary total disability rate should be modified to reflect a rate of $317.58.[1] Claimant raised this issue at the regular hearing; SALJ Nelson did not address it. Claimant maintains the remainder of the Award should be affirmed.

---

[1] Claimant's Brief at 5. Claimant's brief, in the conclusion section, also indicates her compensation rate should be $251.32.

The issues before the Board are:

(1) Did claimant sustain personal injury by accident arising out of and in the course of her employment on October 18, 2010?

(2) What is the nature and extent of claimant's disability?

(3) What is claimant's average weekly wage?

(4) Was there a temporary total disability (TTD) underpayment?

FINDINGS OF FACT

Claimant began working for respondent in February 2009 as a front desk clerk. At some point, claimant was promoted to assistant manager. She earned $8.25 an hour for the first 40 hours worked per week, plus $100 bonus every paycheck (bi-weekly) to cover the first eight hours of overtime, as well as additional overtime.

On October 18, 2010, claimant was working in the laundry room when she slipped on some soapy water on the floor, fell and landed on the back of her hip area on the right side. She initially thought she was fine, but soon had to sit down due to excruciating pain and burning in her mid-back. She testified she reported the incident to her boss, Gary Patel, but did not complete any paperwork. She finished her shift and, at Mr. Patel's suggestion, took an Epsom salt bath at home. The bath failed to alleviate her symptoms.

Alycia Madsen worked with claimant as a front desk clerk in October and November of 2010. Ms. Madsen testified that on October 18, 2010, claimant told her she had fallen in the laundry room and indicated she was not really hurting and was not going to go to the doctor, but was not going to play volleyball that night to be safe. She further testified that between October 25 and November 2, 2010, claimant told her and another coworker, Rita Collins, that she had slipped and fallen while playing volleyball, and that such event most likely occurred on October 25, 2010. Claimant admitted to having fallen while playing volleyball before October 18, 2010, but denied having any falls after that date.

Virginia Clawson played on the same volleyball team with claimant in 2010. Ms. Clawson testified that in October 2010, towards the end of the season, claimant called her to let her know she would not attend that evening's game because she had fallen at work and was hurt. The following week, claimant came to the game, but just sat on the sidelines with a pillow and watched. For the final game, which was probably November 1, 2010, Ms. Clawson arrived approximately five minutes late so has no idea whether claimant fell during those few minutes. She testified claimant only played five or ten minutes because she had back pain after hitting the ball with her arms extended above her head.

Between October 18 and November 2, 2010, claimant continued to work her regular shifts, but testified her pain level ranged anywhere from a 6 to 10, presumably on a 0-10 pain scale. She thought she had pulled a muscle or something so she just sat down more than usual at work and took Advil and Aleve for pain.

On October 25, 2010, claimant was seen by her primary care physician, Dr. Taylor. Jerree Cooper, a registered nurse, noted claimant fell one week ago, but marked through and initialed such comment. Ms. Cooper believed the statement had been marked through because it was not pertinent to claimant's visit, which concerned productive cough, chest tightness, dizziness, increased temperature and body aches. Ms. Cooper admitted that if claimant had indicated the fall was work related, she would have noted that, even though work injuries must first go through workers compensation insurance before being treated. Ms. Cooper testified it was likely that she stopped claimant from volunteering much information about her fall because the clinic staff generally treated one issue at a time.

On November 2, 2010, claimant notified Mr. Patel that her back was not getting any better and requested medical treatment. He initially told claimant to schedule an appointment with her primary care physician, but when they would not agree to see her without workers compensation approval, he contacted the insurance company. Claimant testified Mr. Patel told the insurance company she was injured on November 1, 2010, and asked her to go along with that date. Claimant has not worked since November 2, 2010.

Claimant initiated an email exchange with respondent as follows:

On 01/11/11, **Donita Zamarripa** <donutmom_choice@hotmail.com> wrote:

Gary/Amit,

I am worried about the fact that Workmen's Comp believes my injury occurred on the 1st of November instead of the correct date which was the 18th of October. Rita has told me she is questioning my injury even happening at work because of the dates being off. I'm just not feeling comfortable with this at all. Are you sure we shouldn't let them know the correct date???

Donita

From: gm.ks127@choicehotels.com
To: donutmom_choice@hotmail.com
Date: Tue, 11 Jan 2011 18:30:06 -0600
Subject: Re: Concerned

Donita,

I let the insurance company know October 18th was the date of the injury.

Amit

On 0/12/11, **Donita Zamarripa** <donutmom_choice@hotmail.com> wrote:

Amit,

I am so glad to hear this. It really bothered me when Gary told them the wrong date. I went along with it though so Gary wouldn't get into trouble, but have worried about it so much ever since. When did you tell them? I asked Gary if we could tell them after my second Doctors appointment because they were questioning how old my fractures were, but Gary said he was not going to change the date. So has the case worker been told or did you just call the insurance people??? Need to know to see if I should call the case worker about it as well. Let me know as soon as you can. Thanks for getting that all straitened [sic] out.

Thanks,
Donita

From: gm.ks127@choicehotels.com
To: donutmom_choice@hotmail.com
Date: Wed, 12 Jan 2011 12:52:06 -0600
Subject: Re: Concerned

Donita,

Gary did not tell you to use the wrong date. You were asked about the date it occurred several times when workmans comp was contacted, however you were crying and would not answer. 11/1/10 was used as the reported date from the start from Gary's end. I do not know what you have been using on the forms you have filled out with the doctors. Also, you did not ask Gary to change the date after your second appointment. In fact, we only learned of the actual date of 10/18/10 yesterday when you sent that email. Both have been contacted.

Thanks,
Amit[2]

Claimant was eventually referred to John G. Fan, M.D., who diagnosed compression fractures at T6, T7, and T8 and performed a kyphoplasty in February 2011.

Claimant was evaluated at respondent's request on May 24, 2011, by Paul S. Stein, M.D., a board certified neurosurgeon. Dr. Stein referenced a November 1, 2010 accident, but he may have taken that date out of the records and not gathered such information directly from the claimant.[3] Claimant complained of pain in the thoracic midline which fanned out. Claimant indicated that on a scale from 0-10, her pain level ranged from a 4

---

[2] R.H. Trans., Cl. Ex. 3.

[3] Stein Depo. at 6, 14.

to an 8. She denied any numbness or tingling. She complained that she could only walk for 15 minutes and stand for five minutes. Dr. Stein reviewed MRI scans dated November 23, 2010, and March 14, 2011, and noted they showed very mild anterior compression centered at the seventh thoracic vertebra and mild kyphosis. Dr. Stein concluded "[t]here is no evidence that the mild compression fractures were acute. It is more likely that the fractures themselves were chronic in nature and unrelated to the work injury."[4] Dr. Stein diagnosed claimant with a thoracic strain/sprain and had no recommendations regarding further treatment. He provided no impairment rating, as he was not asked to do so. He provided claimant with no restrictions, as he did not think she needed any.

Claimant was evaluated at the request of her attorney on August 31, 2011, by Pedro A. Murati, M.D, who is board certified in rehabilitation and physical medicine, as well as a certified independent medical examiner. Claimant complained of extreme middle and upper back pain. Claimant indicated she has trouble sitting and standing for long periods of time, cannot walk more than 15 minutes, cannot do everyday household chores and cannot ride in a vehicle for more than one hour. Dr. Murati reviewed MRI scans and concluded the one dated November 23, 2010, showed compression fractures at T6, T7 and T8; and that the March 14, 2011 MRI showed compression fractures at T6 (less than 25%), T7 (between 25 and 50%), and T8 (less than 25%).

Dr. Murati provided claimant with the following whole person ratings: (1) a 5% impairment for DRE Category II for the T6 compression fracture; (2) a 15% impairment for DRE Category III for the T7 compression fracture; and (3) a 5% impairment for DRE Category II for the T8 compression fracture, which combine for a 23% impairment pursuant to the AMA *Guides*[5] (hereafter *Guides*). Dr. Murati opined that claimant's diagnoses were the direct result of her October 18, 2010 injury. Dr. Murati provided permanent restrictions of avoid trunk twisting as well as no lifting/carrying and pushing/pulling greater than 20 pounds, up to 20 pounds occasionally, and up to 10 pounds frequently.

Claimant's deposition was taken January 23, 2012. She testified her accident was on October 18, 2010 and she thought such date was a Thursday. She also testified that she fell on her left side, not her right side. She testified that her pain was in the middle of her back, but either "a little bit more to the right" or "slightly to the right."[6]

A second prehearing settlement conference was held March 5, 2012. SALJ Nelson appointed Pat D. Do, M.D., to perform an independent medical evaluation.

---

[4] *Id.*, Ex. 2 at 4.

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[6] Claimant's Depo. at 24.

On April 30, 2012, claimant was evaluated by Dr. Do, a board certified orthopedic surgeon. Dr. Do noted that a post-accident MRI showed very mild wedging at T6, T7 and T8, but did not show edema suggestive of an acute injury. Dr. Do diagnosed claimant with thoracic pain, which he believed was mostly myofascial. Dr. Do provided a 10% whole person impairment pursuant to the *Guides*, and gave permanent restrictions of no lifting over 20 pounds, occasional lifting over 10 pounds, and continuous lifting up to 10 pounds.

The regular hearing was held June 15, 2012. Claimant testified her accident occurred on Monday, October 18, 2010, not on a Thursday. Claimant testified that her pain began as a 6 when she played volleyball on November 1, but after hitting a ball, her pain level increased to a 10. She denied falling on November 1, 2010, or that hitting the ball caused a permanent increase in her pain level. Claimant admitted she did not request medical treatment for her back injury until November 2, 2010. Claimant admitted prior injuries to her neck and lower back, but denied any injuries involving her mid-back.

Dr. Murati testified on July 2, 2012. Dr. Murati criticized Dr. Do's rating for only accounting for one vertebral compression instead of three compression fractures. Dr. Murati acknowledged there is no way to know when claimant's compression fractures actually occurred, but he believes claimant's accident was the cause because she had thoracic pain thereafter. He admitted compression fractures can occur without an acute injury, but they are usually accompanied with intense pain. Dr. Murati reviewed a task list compiled by vocational expert Dr. Robert Barnett, and opined claimant was unable to perform 22 of 24 unduplicated tasks for a 92% task loss.

Dr. Do testified on September 19, 2012, that the only thing supporting claimant's subjective complaints was that her thoracic spine had some compression. Dr. Do opined that the compression was not related to her work injury, but that she had mostly myofascial thoracic pain. Dr. Do testified that, as a result of the work injury, claimant had a 10% whole person impairment rating, as follows:

> Q. How did [you] arrive at a 10 percent rating?
>
> A. She would fall somewhere in between Category II and Category III. She doesn't quite fit. Category II would be a 5 percent whole person impairment. Category III would be a 15 percent whole person impairment. The reason she didn't fall in a Category III is that she didn't have any neurological symptoms, radiculopathy, which would be Category III for 15 percent, and with her minor compression she's closer to Category II minor impairment, so to split the difference I gave her 10 percent whole person impairment.[7]

Dr. Do reviewed Dr. Barnett's task list and opined claimant was unable to perform 11 of 24 tasks for a 45.8% task loss.

---

[7] Do Depo. at 7.

Dr. Stein testified on September 25, 2012, that claimant sustained soft tissue injury to the thoracic area, perhaps involving the muscles, ligaments and tendons, with resulting pain. Dr. Stein testified that the lack of edema on the November 23, 2010 thoracic spine MRI showed claimant's mild compression fractures were not related to her fall.

SALJ Nelson concluded claimant fell on her mid-back on October 18, 2010, while working for respondent; that as a result of the accident, claimant sustained a 10% whole body functional impairment and restrictions which caused a 45.8% task loss; that claimant has a 100% wage loss and, therefore a 72.9% permanent partial general disability.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

K.S.A. 44–508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total

---

[8] K.S.A. 2010 Supp. 44-501(a).

[9] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

> physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2010 Supp. 44-511 states in part:

> (b)(4) . . . if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

ANALYSIS

(1) Claimant Sustained Personal Injury Arising Out of and in the Course of Employment on October 18, 2010.

Claimant sustained personal injury by accident arising out of and in the course of her employment on October 18, 2010. Whether claimant initially indicated she was injured on a Thursday, instead of a Monday, is of little consequence. Similarly, the discrepancy between the potential accident dates, whether October 18 or November 1, 2010, is of little significance. Claimant testified, without contradiction, that she told Mr. Patel about her accident the same day that it occurred. Ms. Madsen also acknowledged that claimant told her on October 18, 2010, that she slipped and fell in the laundry room. The fact that claimant told Jerree Cooper, at her October 25, 2010 visit to the Clara Barton Medical Clinic, that she fell a week ago, supports claimant's testimony that she fell on or about October 18, 2010.

Claimant's error in testifying at her deposition that she fell on her left side is also a red herring, insofar as claimant told Dr. Murati that she "landed on her back and right hip area[,]"[10] she told Dr. Stein that she fell primarily on her right side,[11] she told Dr. Do that she "fell on her right buttock area[,]"[12] and she told Jeannie Burmester, a physician assistant with Great Bend Internists, that she fell on her right hip at their visits dated November 2, November 10, November 24 and December 8, 2010.[13] Claimant's deposition testimony that she fell on her left side is the outlier, but even then she testified that she hurt more to the right.[14]

The possibility that claimant was injured playing volleyball warrants some discussion. Claimant did not seek any medical attention for her mid-back injury until the day after she tried to play volleyball for five or ten minutes. According to Ms. Madsen, claimant denied injury on October 18, 2010. Ms. Madsen also contends that claimant slipped and fell while playing volleyball after October 18, 2010, likely on October 25, 2010. There is no other evidence, whether through testimony or medical records, that claimant slipped and fell while playing volleyball. Claimant testified that she did not play volleyball on October 18 or October 25, and was only able to play volleyball briefly on November 1, 2010. The Board concludes claimant did not suffer an intervening accidental injury from playing volleyball.

All three testifying physicians noted that claimant's October 18, 2010 accident resulted in physical injury, with Drs. Do and Stein identifying soft tissue injury, whereas Dr. Murati attributed claimant's compression fractures to the accident. While Drs. Do and Stein testified that claimant's compression fractures predated the accident, none of the doctors testified that claimant was not hurt as alleged or that claimant's thoracic problems were entirely preexisting.

(2) Claimant has a 10% Functional Impairment to the Body as a Whole and a 72% Work Disability Based on Dr. Do's Opinions.

The Board affirms SALJ Nelson's findings and conclusions regarding claimant's functional impairment and work disability. Only two physicians provided functional impairment or task loss opinions. SALJ Nelson adopted the functional impairment and task loss opinion from the court-appointed physician, Dr. Do, which was a reasonable approach.

---

[10] Murati Depo., Ex. 2 at 1.

[11] Stein Depo. at 4, Ex. 2 at 1.

[12] Do Depo., Ex. 2 at 1.

[13] R.H. Trans. at 53-54; Claimant's Depo. at 27.

[14] Claimant's Depo. at 24.

Dr. Do testified that claimant's functional impairment did not fit nicely into either a 5% whole body rating using DRE Thoracic Category II or a 15% whole body rating using DRE Thoracic Category III. Where the *Guides* do not account for a claimant's impairment, a physician may use his judgment to address impairments not addressed by the *Guides*.[15] Dr. Do's conclusion that claimant has a 10% impairment of function is credible.

Respondent argues Dr. Barnett's task list is unreliable because the physical requirements of the tasks were exaggerated by claimant. For instance, respondent notes it is unrealistic to conclude claimant would need to lift 40 pounds to clean a parking lot, 50 pounds to prepare the breakfast room or 35 pounds to sweep, mop and vacuum, all for respondent, or lift 60 pounds to dress children and 50 pounds to toilet children as a substitute teacher.

There are problems with respondent's argument. Claimant was not extensively questioned about the physical requirements of her tasks. We do not know what she was lifting in some of these tasks. Respondent did not have claimant evaluated by a vocational expert who may have countered Dr. Barnett's descriptions of claimant's tasks. "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[16] Additionally, even if tasks only required claimant to lift just over 20 pounds occasionally, claimant would not be able to do such tasks.

Dr. Barnett testified that claimant's following a lesson plan to substitute teach should have been an included task. The Board concludes that Dr. Do would have concluded that claimant had the ability to follow a lesson plan. Therefore, instead of Dr. Do concluding that claimant could not perform 11 of 24 unduplicated tasks, his task loss opinion should be based on 11 of 25 tasks, or a 44% task loss. Claimant's work disability, when accounting for a 100% wage loss, is 72%.

(3) Claimant's Average Weekly Wage is $360.17.

Claimant's straight-time weekly wage was $330 based on 40 hours per week at $8.25. The wage statement does not go back 26 weeks immediately preceding the date of accident. Given that claimant's wage statement shows that she was paid every two weeks, the Board concludes that the wage statement covers the time period June 25, 2010 through November 12, 2010, or 16.43 weeks. Wages earned after claimant's accident are not relevant to determine her pre-injury average weekly wage.

---

[15] K.S.A. 44-510e(a); See *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 202 P.3d 108 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010, and *Kinser v. Topeka Tree Care, Inc.*, No. 1,014,332, 2006 WL 2632002 (Kan. WCAB Aug. 1, 2006).

[16] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036, syl. ¶ 5 (1978).

SALJ Nelson noted that he would attribute three-fourteenth of the overtime noted on claimant's pay period ending October 29, 2010 as overtime she earned before her October 18, 2010 accident. While this approach is reasonable, only wages earned before the date of accident are to be considered, so the Board will attribute two-fourteenth or one-seventh of claimant's overtime in that pay period as having been earned prior to her accident. As such, claimant's total overtime for the 16.43 weeks is $495.62. Dividing such figure by 16.43 weeks results in average weekly overtime of $30.17. Claimant's straight-time wages and overtime wages total $360.17 and her compensation rate is $240.13.

(4) Claimant is Entitled to a TTD Underpayment.

Claimant was paid $5,720 in TTD at the rate of $232.70. SALJ Nelson noted that claimant was paid TTD for 24.5 weeks (as indicated by respondent's counsel at the regular hearing and on the prehearing settlement conference stipulation sheet). Claimant likely should have been paid 24.57 weeks of TTD, as TTD is typically paid in fractions of the number of days in a week (e.g., 0.57 weeks would be 4 days out of the week, per K.A.R. 51-7-2). Dividing the total paid by the $232.70 rate shows that 24.58 weeks of TTD was paid. Claimant was underpaid $7.43 per week ($240.13 - $232.70 = $7.43). Claimant is entitled to $182.63 to account for the TTD underpayment (24.58 weeks x $7.43 = $182.63).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of SALJ Nelson should be modified. Claimant's October 18, 2010 accidental injury arose out of and in the course of her employment. She sustained a 10% whole body impairment of function and a 72% work disability. Her average weekly wage was $360.17.

AWARD

WHEREFORE, the Board rules that Special Administrative Law Judge C. Stanley Nelson's December 10, 2012 Award is modified as noted above.

Claimant is entitled to 24.58 weeks of temporary total disability compensation at the rate of $240.13 per week or $5,902.63, followed by 291.90 weeks of permanent partial disability compensation at the rate of $240.13 per week, or $70,093.95, for a 72% work disability, making a total Award of $75,996.58.

As of April 29, 2013, there would be due and owing to the claimant 24.58 weeks of temporary total disability compensation at the rate of $240.13 per week in the sum of $5,902.63, plus 107.42 weeks of permanent partial disability compensation at the rate of $240.13 per week in the sum of $25,794.77, for a total due and owing of $31,697.40, which is ordered paid in one lump sum, less amounts previously paid. Thereafter, the remaining balance in the amount of $44,299.18 shall be paid at the rate of $240.13 per week or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENTING OPINION

The undersigned Board Member respectfully dissents from the majority ruling that claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent. If claimant did sustain a work-related injury, the injury did not result in a permanent functional impairment.

The medical evidence that claimant sustained a personal injury by accident is, at best, minimal. Drs. Stein and Do opined that claimant's thoracic compression fractures were not related to her fall at work. Dr. Stein indicated claimant's thoracic fractures were chronic, not acute, and were preexisting. The November 23, 2010 MRI showed mild mid-dorsal chronic compression deformities, negative for an acute fracture or aggressive abnormality.

Although claimant testified she sustained a back injury at work on October 18, 2010, there is ample evidence that she sustained her back injury while playing volleyball on October 25 or November 1, 2010. Claimant testified that hitting a volleyball on November 1 caused a permanent increase in her pain level. Claimant did not seek medical treatment for her alleged October 18 injury until October 25, and that was for a cough and flu-like symptoms, not for her alleged back injury. Dr. Do found it odd that claimant did not mention back pain when she saw her family physician on October 25. This was despite the fact claimant told Dr. Do the back pain started right after the accident. The first time claimant was treated for a back injury was on November 2. Following her October 18 fall, claimant continued to perform her regular work duties for respondent until November 2.

There is insufficient evidence to show that if claimant sustained a work-related injury on October 18, it resulted in a permanent functional impairment. Dr. Do acknowledged that his functional impairment rating was based upon claimant's subjective complaints, not objective findings. In essence, Dr. Do based his functional impairment rating on the fact that claimant was tender in the mid-thoracic spine. Dr. Stein diagnosed claimant with a thoracic sprain/strain and provided claimant with no work restrictions, as he felt claimant needed none.

_____
BOARD MEMBER

c: Matthew L. Bretz
matt@bretzpilaw.com

Katie M. Black
mvpkc@mvplaw.com; kblack@mvplaw.com

C. Stanley Nelson, Special Administrative Law Judge